

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JILL McNEARNEY,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF  
CORRECTIONS and DR. STEVEN  
HAMMOND,

Defendants.

No. C11-5930 RBL/KLS

**REPORT AND RECOMMENDATION  
NOTED FOR: January 25, 2013**

Before the Court is Defendants' Motion for Modification of Court's Injunction Order. ECF No. 44. Defendants move this Court to modify the Injunction Order recommended at ECF No. 27, page 28, and adopted by the District Court on August 16, 2012. ECF No. 36. Plaintiff has filed no opposition to Defendants' request to modify the Injunction Order.

**BACKGROUND**

On April 12, 2012, the Plaintiff filed a motion for a preliminary injunction against the Defendants. ECF No. 10. On August 16, 2012, the Court adopted the Magistrate Judge's report and recommendation (ECF No. 27) granting the Plaintiff's request for injunctive relief. ECF No. 36. The Court ordered the Defendants to arrange for an evaluation by a foot and ankle specialist at Harborview Medical Center as soon as Harborview's schedule permitted. ECF No. 27, at 28. Once the specialist issued a report and recommendation, the Defendants were allowed to dispute the specialist's recommendation by filing a motion to modify the Court's Order within

1 twenty-one (21) days after receiving the specialist's recommendation. ECF No. 27, at 28.

2 Should the Defendants agree with the specialist's recommended treatment, the Court ordered  
3 the Defendants to "authorize, perform, and/or facilitate any treatment recommended. . . ." ECF  
4 No. 27, at 28.

5 On September 14, 2012, Ms. McNearney was seen by Dr. Michael E. Brage at the Foot  
6 and Ankle Institute at Harborview Medical Center. ECF No. 44, Exhibit 1, Declaration of  
7 Megan E. Herdener, ¶ 3. Dr. Brage requested a magnetic resonance imaging (MRI) of Plaintiff's  
8 lower extremity before he could offer a complete diagnosis. *Id.*, ¶ 4. On October 3, 2012, the  
9 Plaintiff had an MRI and the Department sent the MRI report and the images to Dr. Brage on  
10 October 4, 2012. *Id.*, ¶ 5.

12 On November 15, 2012, Megan Herdener, the Advanced Nurse Practitioner Lead at  
13 Washington Corrections Center for Women (WCCW), received Dr. Brage's final report and  
14 recommendation regarding Ms. McNearney's foot and ankle condition after numerous contacts  
15 with staff at the University of Washington Foot and Ankle Institute at Harborview Medical  
16 Center inquiring when it would send Dr. Brage's final report. ECF No. 44, Exhibit 1 (Herdener  
17 Decl.), ¶ 6. In his report, Dr. Brage's assessment was that Ms. McNearney:

19 [S]uffers from severe posttraumatic arthritis of the ankle with a pes planovalgus  
20 deformity. Her tendons are intact. She has a severe nerve palsy and motor  
21 deficits.

22 *Id.*, Exhibit 1 (Herdener Decl.), Attachment A, at 6. Dr. Brage then recommended:

23 At an elective time, she [Ms. McNearney] would need her ankle fused and  
24 her flatfoot corrected. This surgery can be done on an inpatient stay for one  
25 to two days of postop pain control. She will be nonweightbearing for the  
26 duration of healing, and then she will need rehabilitation.

*Id.*, Exhibit 1 (Herdener Decl.), Attachment A, at 6-7.

1 On November 27, 2012, Ms. Herdener met with Ms. McNearney twice to review Dr.  
2 Brage's recommendations with her. During their first appointment, Ms. McNearney informed  
3 Ms. Herdener that Dr. Brage's report "addresses nothing" and Ms. McNearney felt Dr. Brage's  
4 recommendation is just the "quickest, easiest, most temporary solution." ECF No. 44, Exhibit 1  
5 (Hedener Decl.), ¶ 7. When Ms. Herdener asked Ms. McNearney what intervention she desires  
6 for her right lower extremity, Ms. McNearney indicated that she was unsure and she requested  
7 time to think about her options and agreed to return to the clinic in a few hours. *Id.*, ¶ 7. Later  
8 that day, Ms. McNearney returned to the clinic and informed Ms. Herdener that she is not ready  
9 to proceed with the surgery recommended by Dr. Brage. Ms. McNearney indicated that she has  
10 several questions and concerns regarding the procedure recommended by Dr. Brage. Ms.  
11 Herdener helped Ms. McNearney frame her questions and faxed Ms. McNearney's questions to  
12 Dr. Brage and is awaiting his response. Ms. Herdener is unsure when she will receive a response  
13 from Dr. Brage and anticipates that he could take a few weeks to respond to Ms. McNearney's  
14 questions based on Ms. Herdener's prior experience with Dr. Brage. *Id.*, ¶ 8.

15 Ms. McNearney is eligible for early release on January 18, 2013, and she is currently  
16 scheduled to be released on her early release date. ECF No. 44, Exhibit 1 (Hedener Decl.), ¶ 9.

#### 17 DISCUSSION

18 Defendants ask the Court to modify its injunction for clarity and have it end upon Ms.  
19 McNearney's release from WCCW. ECF No. 44.

20 Under the Prison Litigation Reform Act, 18 U.S.C. § 3626 (PLRA), a court shall not  
21 grant or approve prospective relief unless the court finds "such relief is narrowly drawn, extends  
22 no further than necessary to correct the violation of the Federal right, and is the least intrusive  
23 means necessary to correct the violation of the Federal right. . . ." 18 U.S.C. § 3626(a)(1)(A).

1 Additionally, a court shall not order any prospective relief that requires or permits a government  
2 official to exceed his or her authority under State or local law unless federal law requires the  
3 relief, the relief is necessary to correct a violation of a federal right, and no other relief will  
4 correct the violation of the federal right. 18 U.S.C. § 3626(a)(1)(B).

5 When prospective relief is ordered, it will be terminated upon motion of any party, in  
6 pertinent part, two years after the date the court granted or approved the prospective relief or  
7 one year after the date the court has entered an order denying termination of prospective relief.  
8 18 U.S.C. § 3626(b)(1). However, a party may seek modification or termination prior to the  
9 aforementioned time limits if the modification or termination is legally permissible. 18 U.S.C.  
10 § 3626(b)(4).

11 Defendants do not object to Dr. Brage's surgical recommendation. The Court's order  
12 requires the Defendants to authorize, perform, and/or facilitate the recommendation by Dr. Brage  
13 if the Defendants do not oppose the recommended treatment. *See* ECF No. 27, at 28. However,  
14 Ms. McNearney has refused the recommended surgical procedure and Defendants cannot  
15 facilitate Dr. Brage's recommended course of action unless Ms. McNearney consents to the  
16 recommended surgical procedure.

17 In addition, Ms. McNearney's early release date is January 18, 2013, and Ms. McNearney  
18 will likely be released on this date. ECF No. 44, Exhibit 1 (Herdener Decl.), ¶ 9. After Ms.  
19 McNearney is released, the Department of Corrections (Department) no longer has control over  
20 Ms. McNearney's medical care, and Ms. McNearney will be free to pursue her own medical  
21 treatment. Moreover, since Ms. McNearney has, in the short term, declined to go forward with  
22 the procedure recommended by Dr. Brage until she is able to have some questions answered; it is  
23 possible that Ms. McNearney will be released from the Department's custody by the time Dr.

1 Brage is available to perform the recommended surgical procedures. Additionally, Dr. Brage's  
2 report clearly indicates that his only recommended treatment is an elective surgical procedure  
3 and there is not an emergent need to perform the procedure right now. ECF No. 44, Exhibit 1  
4 (Herdener Decl.), Attachment A, at 6.

5 Therefore, based on Dr. Brage's report and the current circumstances faced by the  
6 Defendants, the Court's order is not narrowly drawn or the least intrusive means necessary to  
7 correct the alleged violation, and it may, unintentionally, require the Defendants to exceed their  
8 authority regarding Ms. McNearney's medical care when it requires the Defendants to  
9 potentially facilitate an elective medical procedure even after Ms. McNearney is released from  
10 the Department's custody and control.

### 12 CONCLUSION

13 Based on the foregoing, the undersigned recommends that the Court grant Defendants'  
14 Motion for Modification of Court's Injunction Order (ECF No. 44). The Court should modify  
15 the Injunction Order (ECF No. 27) on page 28 (adopted by Order at ECF No. 36), as follows:  
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17 5) If the Defendants do not oppose the treatment recommendation by  
18 the foot and ankle specialist at the Foot and Ankle Institute at Harborview  
19 Medical Center, the Defendants shall authorize, perform, and/or facilitate the  
20 recommended treatment should Ms. McNearney elect to have the recommended  
21 surgical procedure while she is in the custody of the Department of Corrections.

22 6) This order will automatically terminate upon the release of the  
23 Plaintiff from the Department of Corrections' custody.

24 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
25 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
26 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the

1 time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on  
2 **January 25, 2013**, as noted in the caption.

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4 **DATED** this 9th day of January, 2013.

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8 Karen L. Strombom  
9 United States Magistrate Judge  
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